Supreme Court, U.S.
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No. 03 328

IN THE
Supreme Court of the United States
October Term, 2003

MELKA MARINE, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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August 2003

10 HPP

Question Presented for Review

Did the trial court flagrantly disregard the law under EAJA when the trial court cited the correct legal standard for determining whether the government's position was substantially justified and then erroneously rule by contradicting said legal standard and did the Federal Circuit further err as a matter of law (even though the Federal Circuit appeared to agree that the trial court committed error), thus preventing Melka Marine, who the government concedes is a prevailing party, from recovering its legal fees under EAJA?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the United States Court of Appeals for the Federal Circuit. Melka Marine, Inc. is not a parent, subsidiary or affiliate of any company; there is no parent or publicly held company owing 10% or more of the corporation's stock.

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Federal Circuit

Melka Marine, Inc., by and through its undersigned counsel, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

Opinion Below

The decision of the United States Court of Appeals for the Federal Circuit from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The subsequent Order issued by the United States Court of Appeals for the Federal Circuit denying and declining, respectfully, petitioner's combined petition for rehearing and suggestion for rehearing en banc appears in the Appendix hereto at page A-61.

Jurisdiction

The decision of the United States Court of Appeals for the Federal Circuit was entered on March 7, 2003. A timely combined petition for rehearing and suggestion for rehearing en banc was filed on April 21, 2003; an Order denying the combined petition for rehearing and suggestion for rehearing en banc was entered by the United States Court of Appeals for the Federal Circuit on May 29, 2003. This petition for writ of certiorari was filed within ninety days of May 29, 2003. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

Statutory Provisions Involved

The pertinent language of Title 28 U.S.C., § 2412 is as follows:

> "§ 2412(d)(1)(A) . . . a court shall award to a prevailing party . . . expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . .unless the court finds that the position of the United States was substantially justified . . .
>
> "§ 2412(d)(1)(B) . . . Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) . . . ."

Statement of the Case

This petition for writ of certiorari arises from an Application for Attorney's Fees under the Equal Access to Justice Act (herein sometimes referred to as "EAJA") related to litigation of a claim involving a construction contract entitled Repairs to Marina, Building 1689, Indian Head Division, Naval Surface Warfare Center, Indian Head, Maryland. By way of background (the facts within this Statement of the Case were conclusively established through numerous requests for admission), the United States of America, acting by and through its Department of the Navy, awarded said contract on October 17, 1994 to Melka Marine, Inc. (herein sometimes referred to as "Melka Marine"). Included in the contract work was dredging in the Potomac River, the construction of a breakwater, repairs to an existing boat ramp, and various other work. The original contract amount was $305,272.00. The United States of America concedes Melka Marine is a prevailing party under EAJA.

Melka Marine was delayed 419 additional days on the contract work that was scheduled to be completed in 81 days. The contract took 500 days to complete. The government caused the delay by failing to timely obtain a dredging permit. Both the dredging and the breakwater work could not be started without the dredging permit. The contract allowed only 90 days to complete the actual work and an additional 15 days for insurance and bonds for a total contract time of 105 days. The contract required Melka Marine to commence work within said 15 days

after contract award and stated the original completion date as January 30, 1995. Melka Marine began mobilization on November 1, 1994 and completed mobilization on November 15, 1994. Melka Marine was liable for liquidated damages in the amount of $200.00 per day plus any fines that may have been leveled if the work was not completed within the time allowed under the contract.

Melka Marine originally scheduled the work to commence on November 1, 1994 and scheduled completion, including demobilization, by January 6, 1995 or within 81 calendar days of contract award. Melka Marine's schedule was submitted for approval on October 27, 1994 and the same dates were resubmitted in a revised format on November 12, 1994; the revised format was approved by the government on November 22, 1994. Melka Marine had carefully scheduled the work, including the dredging and breakwater work, to be completed within the time stated in the approved scheduled.

Furthermore, the approved schedule of prices, breaks down the contract price as follows:

1. Mobilization	$37,500
2. Breakwater	100,606
3. Dredge & Disposal	116,552
4. Repair Quaywall	24,346
5. Repair Boat Ramp	13,362
6. Drive Pile	1,774
7. Repair Finger Pier	1,133
8. Demobilization	10,000
Total	$305,272

After Melka Marine completed the mobilization which was $37,500 or 12 percent

(37,500/305,272) of the original contract amount, the remaining "Breakwater, Dredge & Disposal" items are priced at 100,606 and 116,552, respectively, or 71 percent (217,158/305,272) of the original contract amount. The work that Melka Marine was able to perform without the dredging permit consisted of Repair Quaywall, Repair Boat Ramp, Drive Pile and Repair Finger Pier work items which are priced at 24,346; 13,362; 1,774; and 1,133 respectively, or 13 percent (40,615/305,272) of the original contract amount. That is, after Melka Marine had completed the mobilization, without the dredging permit, Melka Marine was only able to proceed with 13 percent of the original contract work. The lack of the dredging permit caused Melka Marine to be delayed in the performance of 71 percent of the original contract work ("Breakwater, Dredge & Disposal" items). Hence, it is clear that Melka Marine was delayed from performing a major part of the contract.

On November 29, 1994, the government by and through the Contracting Officer issued a formal "Suspension of Work" Order that suspended the dredging and breakwater work "for an indefinite period" and stated:

> "Pursuant to the Federal Acquisition Regulation (FAR), Contract Clause 'Suspension of Work' (APR 84), this correspondence shall serve as a 'Suspension of Work' for an indefinite period. YOU ARE HEREBY DIRECTED to stop all performance immediately on all work called for by the subject contract.

> "Upon receipt of this letter you shall immediately comply with its terms and take all reasonable steps necessary to minimize the incurrence of costs to work covered by suspension during the period of work stoppage." (Emphasis in original text.)

Following the above direction, Melka Marine received further direction in a letter dated December 1, 1994 that stated:

> "The following information shall revise our fax dated 29 November 1994 which directed you to stop work. The Corps of Engineer permit for this project is not expected to be approved until mid-January or mid-February. Therefore, all work relating to the dredging and breakwater repairs cannot begin until the permit is received.
>
> "Work may commence on the repairs to the quaywall and to the finger pier. The A/E is investigating the boat ramp questions brought up in your letter dated 23 November 1994. Once clarification on those questions is received, work may continue on the boat ramp. All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized. Take any other steps necessary to minimize the incurrence of costs due to the suspension of permit related work."

Thereafter, on March 31, 1995 after several letters, numerous discussions and revised drafts, the parties executed a contract modification entitled P00001 related to the "Suspension of Work" Order. There was disagreement as to the proposed language of P00001 between the parties; Melka Marine was straight forward in advising the government that Melka Marine did not want to waive its claims for additional delay costs. The government stated in writing the following on March 31, 1995:

> "Included is the best that I can do to revise the language on the modification. I reiterate that this modification has to be signed today because of funds expiration. Please let me know ASAP if you are willing to come in and sign the modification today, so I know whether to proceed with a termination for convenience or not."

Even though the government stated to Melka Marine that Melka Marine had to sign P00001 or have the contract terminated for convenience, the government still intended to terminate the contract for convenience if the government did not see progress with the permit. In an internal government memorandum drafted March 20, 1995, the government states:

> "1. Contractor has been under a stop work order since 1 December 1994 on the dredging and breakwater portions of the project. The required COE permits for dredging were never obtained by the government as

required. To this date, the permits still have not been received.

. . .

"4. In a phone conversation with Steve Orsino (EFA Ches Legal) on 17 March 1995, he indicated to go ahead with a modification to delay the work until 15 October 1995. If we did not see any progress with the permit, we could T4C before that date.

". . . [E.S. McGinley, III] 3/20/95"

On March 31, 1995, the government issued P00001 (which the government choose to date March 30, 1995 purportedly because of funding) stating in part that:

"1. Dredging and breakwater extension work cannot begin until 15 October 1995. The only costs associated with this delay are remobilization/demobilization costs equal to those on the schedule of prices, less the bond cost. No impact and/or delay costs associated with the delay in the remaining portion of the work from the date that Melka Marine, Inc. signs this modification until 15 October 1995 will be recognized.

(P/C #1) ADD $42,688.00

"The contract time is hereby EXTENDED by 395 calendar days from 30 January 1995 to and including 29 February 1996."

On April 4, 1995, Melka Marine advised the government by letter as follows:

> "This letter is to confirm Melka Marine, Inc.'s (MMI) understanding regarding the signing of P00001. It was understood by all that MMI reserves its rights and intends to file claims from commence of the contract through March 30, 1995 and MMI did not relinquish any rights to file claims after October 15, 1995. As I explained to Ms. Cooper and Lt. McGinley, MMI will be filing any claims after the cost are ascertained.
>
> "If there is any disagreement with the contents of this letter, then your immediate response will be appreciated."

Melka Marine did not receive any objections to the above letter dated April 4, 1995.

Any costs recovered through any contract modifications have not been claimed again by Melka Marine. Note that P00002 was for repairs to the quaywall and for the delay as a result of an uncovered pipe. P00003 only covered 12 days of delay for only equipment costs. As the government conceded before the trial court on pages 4 and 5 of Defendant's Motion for Reconsideration:

> " . . . The Court's conclusion is based upon a partially mistaken conception of the Government's argument. While we do contend that <u>12 days</u> of equipment costs (for a period of delay through December 15,

> 1994) during the period of delay for which Melka seeks idle equipment costs have already been paid through Contract Modification P00003 (footnote omitted), the vast majority of the costs claimed by Melka for idle equipment and labor are not covered by any modification."

Said contract states that the "Suspension of Work" clause (April 1984) is part of the contract between the parties. The "Suspension of Work" clause states in part that: "an adjustment shall be made for any increase in the cost of performance of this contract".

The trial court ruled that Melka Marine was not entitled to any recovery for any of the costs claimed for the delay. (A-41) The Federal Circuit reversed the holding of the trial court with respect to the denial of unabsorbed costs during the time period of January 4, 1995 to February 2, 1995 and remanded the case to the trial court. (A-10) The Federal Circuit affirmed the denial of all other costs including equipment delay costs, unproductive labor costs and unabsorbed overhead costs for the time period from November 16, 1994 to January 3, 1995 and from February 3, 1995 to March 30, 1995. Thereafter upon remand, the trial court entered judgment in favor of Melka Marine on November 1, 2000. (A-40) The trial court denied Melka Marine's EAJA application for attorney's fees. (A-38) The Court of Appeals remanded the matter to trial court with instructions "the Court of Federal Claims should accept such application and consider the attorney fees issue on its merits without any

prejudicial effect from Melka's two unsuccessful applications". (A-2) The trial court again denied Melka Marine application for attorney's fees. (A-33) The Court of Appeals affirmed. (A-2)

The United States Court of Appeals for the Federal Circuit had jurisdiction pursuant to Title 28, United States Code, Section 1295(a)(3)(1994). The United States Court of Federal Claims had jurisdiction pursuant to Title 28, United States Code, Section 1491 and Title 41, United States Code, Section 601 et seq. An earlier order of the United States Court of Appeals for the Federal Circuit appears in the Appendix hereto at page A-10. [*Melka Marine, Inc.* v. *United States*, 187 F.3d 1370 (1999).] Another earlier order of the United States Court of Appeals for the Federal Circuit appears in the Appendix hereto at page A-2. [*Melka Marine, Inc.* v. *United States*, 29 Fed.Appx. 594 (2002).] The Judgment Order of the trial court, the United States Court of Federal Claims, also appears in the Appendix hereto at page A-41. [*Melka Marine, Inc.* v. *United States*, 41 Fed. Cl. 122 (1998).] An earlier order entered by the trial court denying cross-motions for summary judgment also appears in the Appendix hereto at page A-57. [*Melka Marine, Inc.* v. *United States*, 38 Fed. Cl. 545 (1997).] The Judgment Order of the trial court on remand from the United States Court of Appeals for the Federal Circuit dated November 1, 2000 also appears in the Appendix hereto at page A-40. Melka Marine has previously filed pleadings before this Court in this case. [*Melka Marine, Inc.* v. *United States*, 529 U.S. 1053 (2000); also see *Melka Marine, Inc.* v. *United States*, 532 U.S. 902 (2001).]

Reasons for Granting the Writ

This action was originally filed in the trial court on August 27, 1996. The government filed its answer denying all liability on October 28, 1996. Thus, the government adopted its legal position no later than October 28, 1996. The trial court correctly noted in its decision (A-34) that:

> "The timing of a government formulation of its position is the issue in *Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000) ('[S]ubstantial justification is measured, not against the case law existing at the time the EAJA motion is decided, but rather, against the case law that was prevailing at the time the government adopted its position.')."

In direct contradiction of the above-quoted language contained in the trial court's own opinion, the trial court then in the very next paragraph of its decision refers to not the point in time in which the government adopted its legal position, but the point in time in which the trial court actually rendered its decision on the merits of the instant action. (A-33) Note that said decision of the trial court was issued on June 10, 1998. *See Melka Marine, Inc.* v. *United States*, 41 Fed.Cl. 122 (1998). Note further that the difference in the point of time of the government's answer denying all liability dated October 28, 1996 and the point of time of said trial court's decision dated June 10, 1998 is over nineteen months. As a matter of law, the trial court erred in its legal interpretation of EAJA that the correct

point in time to determine whether the government's position was substantially justified is when the trial court rendered its decision rather than the point in time in which the government adopted its legal position. In the instant case its makes a difference, because in the interim period the Federal Circuit rendered its decision in case of *Satellite Elec. Co.* v. *Dalton*, 105 F.3d 1418 (Fed. Cir. 1997). The trial court and the government relied upon *Satellite Elec. Co.* v. *Dalton* for their respective positions and/or decisions in this action. Note that *Satellite Elec. Co.* v. *Dalton* did not exist when the government adopted its legal position. The burden is on the government to present a substantial justification for the position of the government. *Pierce* v. *Underwood*, 487 U.S. 552, 575-576 (1988). The government made the following argument before the Federal Circuit (which was unofficially transcribed by the undersigned attorney for Melka from the recording of the oral argument):

> Mr. Sullivan [for the U.S.]: . . . There is one substance argument worth addressing and that's Melka's claim that the trial court erred as a matter of law because although it stated the correct legal standard the trial court improperly focus upon our position—whether our position was substantially justified—at the time the lower court issued its decision rather that when we adopted our position. Now Melka . . .
>
> Circuit Judge Clevenger: That seems to be what Judge Hodges was doing.

> Mr. Sullivan: Well.
> Circuit Judge Clevenger: Don't you agree with that?
> Mr. Sullivan: I think the lower court opinion is not—its rather brief and not very explicit, but . . .
> . . .
>
> Circuit Judge Clevenger: . . . At the time, let's take at the time the government either denied the claim or when they filed their answer, June or October of 96, what was the government's position?
> Mr. Sullivan: We . . .
> Circuit Judge Clevenger: The Government position is that you don't get your home office overhead, but why?
> . . .
>
> Circuit Judge Clevenger: . . . That when you filed your answer?
> . . .
>
> Circuit Judge Clevenger: That would be in October of 96.
> Mr. Sullivan: October of 96 is when we filed the answer.

Thus, it appears to Melka Marine that Federal Circuit agreed that the trial court committed error; however, despite the above-quoted words, the Federal Circuit then affirmed the trial's courts decision. As this Court is aware, the distribution of EAJA awards is a national problem.

The position of the government was not substantially justified.

This action can be easily and accurately classified as a claim for delay damages under which compensation was to be determined under the Suspension of Work clause in the contract between the parties. Prior to the decision of the government not to pay Melka Marine in June 1996, the latest applicable case from this Court was the case of *Altmayer* v. *Johnson*, 79 F.3d 1129 (Fed. Cir. 1996) decided on March 21, 1996. In *Altmayer* v. *Johnson*, 79 F.3d at 1132, Chief Judge Mayer of the Federal Circuit stated the disruption in the work reduces the overhead that is absorbed thereby entitling the contractor to recover the unabsorbed overhead:

> "When the government delays or disrupts contract performance, ultimately requiring that it be extended, the contractor's stream of income from the government for the direct costs it has incurred under the contract is reduced or interrupted. See generally *Wickham*, 12 F.3d at 1577. However, home office overhead continues to accrue throughout both the original and extended performance periods, regardless of direct contract activity . . .
>
> "When the government disrupts or delays a contract, thereby reducing the contractor's stream of direct costs against which to charge its overhead costs, 'it is appropriate to use the

> Eichleay formula to calculate extended home office overhead . . ."

The language from *Altmayer* is in direct contradiction with the position that the government took in this litigation. In *Altmayer*, this Court further stated:

> "Nor is recovery under Eichleay compromised because Haas continued to perform minor tasks throughout the period of government indecision. The standby test does not require that the contractor's work force be idle. Interstate, 12 F.3d at 1057. There is no requirement that a contract be suspended before a contractor is entitled to recover under Eichleay. Indeed, in Eichleay itself, '[p]erformance of the contracts was at no time completely suspended.' *Eichleay Corp.*, 61-1 B.C.A. (CCH) at 15,117; see also *Capital Elec.*, 729 F.2d at 743; *C.B.C. Enters.*, 978 F.2d at 674. As the D.C. Circuit said in rejecting an argument that the Eichleay formula is only applicable to contract suspensions, as opposed to contract extensions:
>
> > It may be true that when a project is extended (not suspended), the work will be ongoing and thus income from the project will continue to be applied to home office overhead costs. On the other hand, when work is extended, the project

> income will be spread over a longer period of time and, consequently, less of the income may be allocated to home office overhead costs. Thus, an extended project -- like a suspended project -- may result in reduced income vis-a-vis overhead costs.
>
> "*Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230, 235 (D.C. Cir. 1991). This is precisely our situation."

As stated above by this Court quoting the District of Columbia Circuit, the case law prior to the government's position to deny any relief was that the contractor need not be sitting idle to collect *Eichleay* damages. In *Altmayer*, this Court stated:

> "Haas continued to do some work during the period of government indecision, but it was on minor items 'susceptible to prompt completion.' (Citation omitted.) . . . Notwithstanding Haas's continuous work on minor contract items, the fact remains that the overall project income was spread over an additional three-month period; hence, less of that income was allocable to home office overhead costs. Therefore, Haas's work on minor contract items does not deprive it of recovery under the Eichleay formula."

Contrary to the implications of the

government, it is not unsettled law that a contractor is entitled to be paid after being delayed by the government. During said delay, a contractor has a duty to mitigate damages. Said mitigation of damages is the basis of the ruling by this Federal Circuit and the reference to replacement work. The failure to mitigate damages is an issue where the government has the burden of proof. The government clearly failed to carry its burden of proof on the issue of mitigation of damages. There is and was nothing novel about Melka Marine's right to recovery from the government for the clear and unreasonable delay caused by the inexcusable failure of the government to obtain a dredging permit before awarding the contract to Melka Marine in 1994.

There was no basis in fact or in law that Melka Marine was not delayed during the time period between January 4, 1995 and February 2, 1995. The government's case clearly offended established precedent. There was no basis for not paying Melka Marine during the time period between January 4, 1995 and February 2, 1995. Satellite Elec. Co. v. *Dalton*, relied upon by the government did not exist at the time the government denied payment to Melka Marine.

In *Pierce* v. *Underwood*, 487 U.S. 552, 560-561 (1988), this Supreme Court stated:

> ". . . Moreover, even if there is a merits appeal, and even if it occurs simultaneously with (or goes to the same panel that entertains) the appeal from the attorney's fee award, the latter legal question will not be precisely the same as the merits: not

> what the law now is, but what the Government was substantially justified in believing it to have been . . . ."

In Pierce v. *Underwood*, 487 U.S. 552, 568-569 (1988), this Supreme Court also addressed the case where, as in the instant case, the trial court denied relief as a matter of law and stated:

> ". . . At least where, as here, the dispute centers upon questions of law rather than fact, summary disposition proves only that the district judge was efficient.
>
> "Both parties rely upon the objective indicia consisting of the views expressed by other courts on the merits of the Government's position. Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose . . . ."

In *Bowey* v. *West*, 218 F.3d 1373, 1377-1378 (Fed. Cir. 2000), the Federal Circuit stated:

> "Our holding in Owen stands for the proposition that substantial justification is measured, not against the case law existing at the time the EAJA motion is decided, but rather, against the case law that was

> prevailing at the time the government adopted its position. Indeed, that has been the consistent rule of this court and other federal courts since shortly after the EAJA was enacted in 1980. See, e.g. Devine v. Sutermeister, 733 F.2d 892, 895 (Fed.Cir.1984) . . .
>
> "Having concluded that 28 U.S.C. § 2412 (d)(1) requires a court to look to the record that existed when the government adopted its litigation position, we must now determine how that rule operates . . .
>
> ". . . [W]e must remand this case to allow the Court of Appeals for Veterans Claims to decide whether the government's position was, in fact, substantially justified at the time it was adopted, based on the record at that time."

In *Bowey* v. *West*, 218 F.3d 1373, 1376, 1377 (Fed. Cir. 2000), the Federal Circuit also stated:

> "The relevant portions of 28 U.S.C. § 2412(d)(1)(A) require that:
>
> > a court shall award to a prevailing party ... expenses ... incurred by that party in any civil action ... brought by or against the United States ...unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(emphasis added). Section 2412(d)(1)(B) provides the following additional guidance:

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(B) (emphasis added).

"Section 2412(d)(1)(B) clearly instructs that substantial justification shall be determined on the basis of 'the record.'

. . .

"In *Owen v. United States*, 861 F.2d 1273, 1274 (Fed.Cir.1988) (en banc) (order), we held that a decision of this court, handed down after the government adopted its litigation position, did not affect our assessment of whether the government's position was substantially justified . . . ."

In *Community Heating & Plumbing Co., Inc.* v. *Garrett*, 2 F.3d 1143, 1145-1146 (Fed. Cir. 1993), the Federal Circuit stated:

"The government now reasons that its

> actions must have been substantially justified since the board had found the government's case convincing. However, the position of the government is not shown to be substantially justified merely because the government prevailed before a lower tribunal. *Schuenemeyer v. United States*, 776 F.2d 329, 331 (Fed.Cir.1985); *Broad Ave. Laundry & Tailoring v. United States*, 693 F.2d 1387, 1392 (Fed.Cir.1982). In the absence of any further explanation, we hold that the government has failed to show that its actions were substantially justified." (Bold emphasis added.)

In *Baldi Bros. Constructors* v. *United States*, 52 Fed.Cl. 78, 81-82 (2002), the court stated:

> "Paradoxically, defendant is silent on this aspect of the litigation. It does not justify its refusal to stipulate liability or its subsequent eleventh-hour decision not to contest liability . . .
>
> "As an initial matter, defendant misses the point that the court is 'required to rule on the EAJA application 'independent from the merits phase.' (Citations omitted.) . . . The fact that plaintiff recovered only 55% of its monetary claim is not of itself sufficient to discharge defendant's burden of proving substantial justification of its position

> before the actual litigation, especially given that plaintiff's diminished recovery represents failure to prove specific damages, rather than exoneration of the Government . . .
>
> "In a remarkable absence of litigation riposte, defendant has made no attempt to provide a 'defense, explanation, or substantiation' for its action, either before or during the litigation phase. Defendant remains silent on the issue of its prelitigation conduct, and its argument that it defeated some of plaintiff's damages claims ignores the well-established convention that the fact that the Government successfully defeated certain claims does not alone establish that it so acted with substantial justification. The standard requires defendant to demonstrate that the Government acted reasonably during the entire dispute. (Citations omitted.) . . . ('[Government] acted unreasonably when it abandoned another claim on eve of trial, making 'no effort to justify why its position changed so abruptly')."

In the instant action, the facts are that Melka Marine's recovery to date "represents the failure" (in the eyes of the courts) "to prove specific damages, rather than exoneration of the [g]overnment". The evidence was clear that it was the government that caused the delay by not

having the required dredging permit.

The government and the trial court overlooked a number of the facts and issues raised in the Application for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act, for example, Melka Marine stated a number of facts that have been admitted to by the government such as:

"REQUEST FOR ADMISSION NO. 76

76. The Resident Officer in Charge of Construction advised the Commanding Officer in an undated Memorandum in part as follows:

> ". . .The ROICC does feel some entitlement is due regarding the period from 9 Jan 95 through 2 Feb 95."

Government's response:

> Admits."

This prelitigation conduct of the government that occurred prior to August 27, 1996 (the date of the filing of the complaint), was contrary to the government's own Resident Officer in Charge of Construction (herein sometimes referred to "ROICC"), who was responsible for overseeing the construction project, and admitted liability in favor of Melka Marine. Thus, at the field level of the Chesapeake Division of the Naval Facilities Engineering Command of the Department of the Navy of the United States of America, the government employees who were responsible for the administration of the contract, wrote a written document recommending that Melka Marine be paid for essentially the same time period that Melka Marine was "later" paid by the government. "[L]ater" means almost six years, the difference in time from when Melka Marine received a check in

"December 2000" as opposed to the time period of said delay which was in "January 1995". This obviously means that over four years (from August 27, 1996 until December 2000) of additional costly litigation was required by Melka Marine (not counting the last 2 1/2 two additional years of litigation). The government chooses to ignore its prelitigation conduct and did not even address the same in its Defendant's Opposition to Application for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act. As the court stated in *Baldi Bros. Constructors* v. *U.S.*, 52 Fed.Cl. 78, 81-82 (2002), the standard requires the government to have substantial justification "during the entire dispute".

Moreover, at the trial, when Mr. Leonard A. Melka, the President of Melka Marine, explained the concept that if a party agrees to rent an entire restaurant and later breaches the agreement and only provides 25 percent of the business and the restaurant is only able to mitigate its damages by obtaining an additional 25 percent of the lost business, the restaurant still incurs damages as a result of said breach, the trial court's comment at the trial on November 24, 1997, shows that the trial court recognized Melka Marine's point of view:

> "THE COURT: No, I see your point exactly, and I agree with you. In fact, that's probably the way most people on the street if you went out and asked if they understand what the equitable result would be, and again I'm not here to **defend the case law** or the statutes that may

> apply here. . . ." (Tr. 96) (Bold emphasis added.)

If another fact were added to the above example, such that the restaurant refused to sit an additional 15 percent of the lost business, then the failure of the restaurant to further mitigate its damages would be a reason to deny recovery of said additional 15 percent. Because Melka Marine did not fail to mitigate its damages, there was no doubt that Melka Marine was entitled to the recovery of Melka Marine's damages. The only basis of the government's position is essentially an argument that Melka Marine failed to mitigate damages. It is most important that the law on the failure to mitigate damages is an area where the government has the burden of proof. Because the government failed to meet said burden of proof clearly does not give the government the gift of "substantial justification" for its position.

Again, it is important to note the law prior to the *Satellite case* (See *Satellite Elec. Co. v. Dalton*, 105 F.3d 1418 (Fed. Cir. 1997)) was that the Government was liable to Melka. The government's actions in this case are clearly contrary to the language contained in the "Suspension of Work" clause. Furthermore, the case relied upon by the government for not paying Melka Marine (the Satellite case) was not decided until after Melka Marine had filed the instant action and the government had denied liability. Clearly, the government was not substantially justified in not paying Melka Marine for a delay caused solely as a result of the government's failure to obtain a dredging permit that the

government was required to obtain. *See Prowest Diversifield, Inc.* v. *U.S.*, 40 Fed.Cl. 879, 884 (1998) ("even if the Government's position during the civil action were justified, such justification could not outweigh the overall lack of substantial justification for the agency's original action"); *KMS Fusion, Inc.* v. *U.S.*, 39 Fed.Cl. 593, 597 (1997) ("'[I]t is now clear that the position of the United States includes the position taken by the agency at the administrative level.'"); *McDowell* v. *U.S.*, 24 Cl.Ct. 205, 209-210 (1991) ("Substantial justification arises from the merit of the position, and not the time spent litigating it. Plaintiff could not take any position of the government lightly; if he failed to show the weakness of even one of the government's arguments, he may have lost his case."); *Weaver-Bailey Contractors, Inc.* v. *U.S.*, 24 Cl.Ct. 576, 578 (1991) ("an EAJA applicant's success on the merits presents a prima facie showing of entitlement to attorney fees which shifts the burden to the government to prove substantial justification.")

The trial court recognized the unfairness of denying Melka Marine recovery of its delay damages and stated:

> ". . . I am always hesitant to grant one of these motions that the government makes at the end of every case, Plaintiff's case, because it's just a waste of everyone's time if it comes back from the circuit and, in effect, saying, well, you should have heard what the government had to say.
>
> ". . . [B]ut I just don't see legally, almost no matter what the

> government puts on, you are going to be able to get over that threshold. And, again, I'm not saying that I think it's fair, but we have very few equitable powers in this Court . . .
>
> "I don't know what will happen with the Satellite line of cases. My own view is that they should be revisited, but that's not my job and it's not my responsibility. But I just don't know any other way to interpret the law that I have to apply at this stage.
>
> "And if they do change it later on, that's even more unfortunate that Melka was caught in the interim phase . . . I will grant the government's motion . . .
>
> "And with regret. I do feel that it's not entirely fair, but, again, that's not the issue before me." (Pages 116-118 of trial transcript, Nov. 24, 1997) (Bold emphasis added.)

Also, in *Doty* v. *U.S.*, 71 F.3d 384, 386 (Fed. Cir. 1995), this Court stated:

> ". . . [T]he term 'position of the United States' refers to the government's position throughout the dispute, including not only its litigating position but also the agency's administrative position. Gavette, 808 F.2d at 1467 . . . ."

Another point is that the Federal Circuit again clarified on June 25, 1998 in *West* v. *All State Boiler, Inc.*, 146 F.3d 1368 (Fed. Cir. 1998)

the standard for entitlement to Eichleay damages. In *All State Boiler*, the court recognized that the government's position (which was similar to the government's position herein before the trial court in this action) "does not make business sense" and stated:

> "[N]o reasonably healthy and prudent contractor[ ] would be able to establish that it was unable to take on additional work during an entire contract period . . . Such an interpretation does not make business sense."

Melka Marine contends that if the government's position "does not make business sense", the government's position is not substantially justified.

In passing, Melka Marine also notes that Senator John Kerry stated on June 18, 2003, while addressing the graduates of the Pine Street Inn's Job Training program in Boston:

> ". . . Everybody goes through dark moments. But not everybody comes back from it . . . We need to reconnect to that sense of citizenship. We are not going to leave any American behind . . . ."

Spare Change News, Published by the Homeless Empowerment Project, Cambridge, Massachusetts, August 7—August 20, 2003, p. 5.

Melka Marine is financially crippled as a result of being damaged by the government. This is a dark moment and thus Melka Marine, who the government concedes is a prevailing party, is seeking EAJA funds to recover its legal expenses.

In summary, although the trial court cited the correct legal standard for making the determination of whether or not the government's position was substantially justified, the trial court in the next paragraph of its decision made an erroneous ruling that was in contradiction of said correct legal standard. The result of this erroneous ruling which was then erroneously marked "affirmed" by the Federal Circuit is that Melka Marine, a small marine construction contractor, was prevented from obtaining a recovery of its legal fees under EAJA. The lower courts have clearly committed error as a matter of law. This Supreme Court is respectfully requested to review this matter.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Melka Marine, Inc.

August 2003

APPENDIX

United States Court of Appeals
for the Federal Circuit
02-5166

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

In CASE NO(S). 96-CV-536

This CAUSE having been heard and considered, it is
ORDERED AND ADJUDGED:

Per Curiam: (MAYER, Chief Judge, LOURIE and CLEVENGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT
_____/s/_____
Jan Horbaly, Clerk

DATED Mar _7 2003

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-5156, -5078

MELKA MARINE, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 6, 2002

[29 Fed.Appx. 594]

Before MAYER, Chief Judge, MICHEL, LOURIE, Circuit Judges.

LOURIE, Circuit Judge.

DECISION

Melka Marine, Inc. appeals from two orders of the United States Court of Claims returning its applications for attorney fees pursuant to the Equal Access Justice Act ("EAJA"). Melka Marine, Inc. v. United States, No. 96-536 C (Fed. Cl. Dec. 4, 2000) (order); Melka Marine, Inc. v. United States, No. 96-536 C (Fed. Cl. Feb. 1, 2001) (order). Because the court did not err in returning the applications, we affirm.

DISCUSSION

Melka's appeal directly concerns only its applications for attorney fees filed in the Court of Federal Claims. However, to better understand the issue concerning its fee applications, an understanding of the overall procedural history of the case is useful. In 1994, the Department of the Navy awarded Melka a contract for dredging along the Potomac River near Washington, D.C., as well as construction and repair of marine structures along the river. Melka was unable to start (and complete) the work according to the agreed-upon time schedule because the Navy was unable to timely obtain a dredging permit from the Army Corp of Engineers. Melka brought suit in the Court of Federal Claims, seeking so-called "Eichleay" damages for unabsorbed overhead resulting from what it asserted was government-caused delay from November 16, 1994, to March 30, 1995. The Court of Federal Claims dismissed Melka's complaint, Melka Marine, Inc. v. United

States, 41 Fed. Cl. 122 (1998), and we affirmed-in-part. We also remanded-in-part for a redetermination of the Eichleay damages for the time period between January 4 and February 2, 1995, Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999). Melka sought Supreme Court review of our decision, but its petition for a writ of certiorari was denied on April 3, 2000. Melka Marine, Inc. v. United States, 529 U.S. 1053 (2000). Meanwhile, the parties agreed to settle the remanded portion of Melka's claim for just over $16,000, and for that purpose they filed in the Court of Federal Claims on October 26, 2000, a Joint Stipulation for Entry of Judgment drafted by Melka. The Court of Federal Claims entered judgment pursuant to the Joint Stipulation on November 1, 2000. On its face, the Joint Stipulation repeatedly and explicitly limits the settlement to the remanded claim only. By its express language, the Joint Stipulation specifically excluded Melka's claims for attorney fees and for Eichleay damages for delays that occurred outside the remanded time interval (i.e., from January 4 to February 2, 1995). Apparently under the impression that the Supreme Court had denied its petition for a writ of certiorari regarding our 1999 decision because we had partially remanded the case, Melka sought Supreme Court review of our 1999 decision a second time, on January 29, 2001, after the Court of Federal Claims had entered judgment on the remanded claim pursuant to the Joint Stipulation. The Supreme Court returned Melka's second for want of jurisdiction, as we had not entered a fresh judgment subsequent to our 1999

decision.

Melka first filed an application for attorney fees under the EAJA in the Court of Federal Claims on December 1, 2000, exactly one month after the entry of judgment on the remanded claim. On December 4, that court ordered the application returned as unfiled on the grounds that it was prematurely filed and not made under oath. According to the court, Melka's application was premature because its November 1 judgment would not become final until the appeal period elapsed, sixty days later. Fed. R. App. P. 4(a)(1)(B). Dissatisfied with the court's action on its application, Melka took two actions on January 26, 2001: it filed a Notice of Appeal in this court from the December 4 order, and it resubmitted its application to the Court of Federal Claims. On February 1, 2001, the Court of Federal Claims ordered the resubmitted application returned as unfiled on the ground that it was untimely due to Melka's filing of the Notice of Appeal, which deprived that court of jurisdiction over the case. Melka filed Notice of Appeal in this court from that February 1 order.

To the extent that the trial court's orders rested on an interpretation of the EAJA, we review that interpretation de novo. To the extent that the court's orders returning Melka's fee applications rested on the court's local rules or an application of the court's local rules -- matters within the sound discretion of the trial court -- we review the court's decision for an abuse of discretion. See Visa Int'l Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472, 1476 (9th Cir. 1986) (applying an abuse of discretion standard

in reviewing a district court's denial of a request for attorneys' fees on the ground that the request was not timely under local rules); see also Chiu. v. United States, 948 F.2d 711, 713 (Fed. Cir. 1991) ("A trial court's decision to award attorney fees under the EAJA, and its determination of the amount of such an award, are discretionary. On appeal, decisions concerning attorney fees are reviewed for abuse of discretion.") (citing Pierce v. Underwood, 487 U.S. 552, 557-63 (1988)).

On appeal, Melka argues that its first fee application (filed on December 1, 2000) was timely submitted because Rule 81 of the Court of Federal Claims required it to submit the application within thirty days of final judgment, i.e., between November I and December 1, 2000. Melka also argues that its fee application was submitted under oath to the extent that Rule 81 requires an oath, and that, in any event, the lack of oath is not a fatal defect. Melka concedes that it filed its second application (filed on January 26, 2001) merely as a protective measure, should its first application be ineffective.

The United States responds that Melka's first application was premature because, pursuant to 28 U.S.C. § 2412(d)(1)(B), read in light of § 2412(d)(2)(G), Rule 81's thirty-day period for filing a fee application under the EAJA does not begin until after the time to appeal has expired, which is sixty days from entry of final judgment, according to Fed. R. App. P. 4(a)(1)(B). The government also responds that Melka's second fee application was untimely because Melka's simultaneous filing of a Notice of Appeal divested the Court of Federal Claims of

jurisdiction.

We affirm the court's order returning the first fee application, but on a somewhat different ground from that indicated in the order. Melka's first application was premature because the court's November 1, 2000 judgment was not a final judgment. The EAJA specifies that a prevailing party seeking attorney fees in a case against the federal government shall submit an application "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1994). The EAJA defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412 (d)(2)(G). Thus, a judgment must meet two requirements before an EAJA fee application can be filed: finality and non-appealability. The November 1, 2000 judgment fails to satisfy the first requirement, finality, because it concerned only a portion of the claims in the case. A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Allen v. Principi, 237 F.3d 1368, 1372 (Fed. Cit. 2001). A judgment disposing of only some asserted claims is typically not final. Aluent Tribe v. United States, 702 F.2d 1015, 1020 (Fed. Cit. 1983). However, an important exception to that general rule is found in Fed. R. Civ. P. 54(b), which permits an appeal from a partial judgment if certified for appeal by the trial court. Id.; CAE Screenplates Inc. v Heinrich Fiedler GmbH & Co. KG, 224 F.3d 1308, 1314, 55 USPQ2d 1804, 1808 (Fed. Cir. 2000). In this case, the court's November 1, 2000 judgment decided only the remand claim. All other claims

remained, per the Joint Stipulation, as Melka was planning its second appeal to the Supreme Court on the remaining claims. The Court of Federal Claims did not issue a Rule 54(b) certification. Consequently, the court's November 1, 2000 judgment was not a final disposition of the case, and thus Melka's first fee application was premature.

As for Melka's second application, we agree with the government's contention, which is undisputed by Melka, that it was filed untimely by virtue of Melka's filing of a Notice of Appeal, "an event of jurisdictional significance," conferring jurisdiction on us and divesting the trial court of its control over those aspects of the case involved in the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).

That is not to say, however, that Melka's fee application may never be further considered. The non-appealability requirement of § 2412(d)(1)(B) has been interpreted to mean that "[t]he 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." Melkonvan v. Sullivan, 501 U.S. 89, 96 (1991). In a case against the government, the appeal period expires sixty days after entry of final judgment. Fed. R. App. P. 4(a)(1)(B). The Court of Federal Claims has interpreted Melkonvan as establishing "only a final deadline for the filing of an EAJA petition, not a window within which an EAJA petition must be filed," thus apparently permitting filing before the beginning.of the period. Gonzalez v. United States, 44 Fed. Cl. 764, 767 (1999). We do not decide today whether Gonzalez correctly interpreted Melkonvan. We only note that

counsel for the government conceded at oral argument that the government will not challenge the timeliness of an attorney fee application filed by Melka within the Melkonvan window, i.e., sixty to ninety days after entry of complete, as opposed to partial, final judgment. When a properly filed fee application is made at that time, the Court of Federal Claims should accept such application and consider the attorney fee issue on its merits without any prejudicial effect from Melka's two unsuccessful applications that have been the subjects of this appeal.

Because the court's return of Melka's EAJA attorney fee applications was in accordance with law and not an abuse of discretion, we

AFFIRM.

United States Court of Appeals for the Federal Circuit

98-5149

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Peter Paul Mitrano, of Etna, New Hampshire, argued for plaintiff-appellant.
Franklin E. White Jr., Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on brief were David M. Cohen, Director, and Sharon Y. Eubanks, Deputy Director.

Appealed from: United States Court of Federal Claims, Judge Robert H. Hodges, Jr.

DECIDED: August 12, 1999

[187 F.3d 1370]

Before MAYER, Chief Judge, MICHEL, and RADER, Circuit Judges.
MICHEL, Circuit Judge.

Melka Marine, Inc. ("Melka") appeals from the decision of the United States Court of Federal Claims, dismissing Melka's complaint which sought damages in connection with a waterfront construction contract awarded by the United States Department of the Navy. See Melka Marine, Inc. v. United States, 41 Fed. Cl. 122 (1998). After denying a motion and cross-motion for summary judgment, the Court of Federal Claims conducted a one-day trial on November 24, 1997. On June 10, 1998, the Court issued an opinion and order denying Melka's claims in their entirety and dismissing Melka's complaint. Melka appeals, contending that it has proven it is entitled to damages stemming from government-caused delay between November 16, 1994 and March 30, 1995. Because the Court applied an incorrect test and Melka has shown that it may be entitled to recover at least some damages for a portion of the time period (if the correct test is used), we affirm-in-part, vacate-in-part, and remand for further proceedings in accordance with this opinion.

BACKGROUND

On October 17, 1994, the United States (the "government"), through the Department of the Navy, awarded Melka a contract that included dredging work in the Potomac River near Washington, DC, as well as the construction of a breakwater, repairs to an existing boat ramp, a quaywall, and a finger pier, and various other repair work. The contract required the government to obtain a dredging permit from the

United States Army Corps of Engineers prior to the commencement of the dredging and breakwater work, but not for the repair work.

On November 4, 1994, the government notified Melka that the permit had not yet been obtained, but was expected at any time. In the meantime, the government noted that no "dredge work can start until this permit is approved, however, construction repairs are not dependent on this permit." Melka mobilized all of its equipment to the job site by November 15, 1994.

On November 16, 1994, Melka sent a letter to the government stating that Melka's proposed schedule for completing the work, previously submitted, would be negatively impacted by the government's failure timely to obtain a permit and that, as requested, it would re-sequence the work to avoid inactivity. The government did not respond to this letter. On November 21, Melka began the re-sequenced work by starting work on the boat ramp. Work was suspended the next day, however, due to the discovery of a six-inch pipe in the ramp and the discovery of a prior boat ramp beneath the existing ramp, which would necessitate a different ramp design.

As a result of these delays and the delay in obtaining a permit, on November 29 the government issued a formal "Suspension of Work" order. The order suspended the commencement of dredging and breakwater work "for an indefinite period." Two days later on December 1, the government revised its "Suspension of Work" order. The letter stated in part:

> The Corps of Engineers permit for this project is not expected to be

> approved until mid-January or mid-February. Therefore, all work relating to the dredging and breakwater repairs cannot begin until the permit is received.
>
> Work may commence on the repairs to the quaywall and to the finger pier. . . . All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or finger pier can be demobilized. Take any other steps necessary to minimize the incurrence of costs due to the suspension of permit related work.

By December 27, 1994, Melka had demobilized its dredging and breakwater equipment while it continued the re-sequenced repair work, which was substantially completed by January 4, 1995.

Melka later mobilized its dredging and breakwater equipment elsewhere for use on other jobs. The two most significant jobs that Melka undertook during this period were the Steuart Petroleum project from January 4-18, 1995, and the Leesylvania Park project from January 20, 1995 through March 31, 1995. Melka originally scheduled these jobs to be performed after the government project, but the government-imposed delay allowed Melka to perform these jobs earlier.

Melka also bid on other projects during this period which it did not receive, but that it would have been able to perform at some point had they been awarded the projects. Indeed, Leonard Melka testified that Melka bid upon "every project

[that it] could find to bid on." Counsel for Melka also indicated at trial that Melka did not turn down any work that had been offered to it during the January time frame.

On February 2, 1995, the parties met to discuss the continuing delay in obtaining the permit. At the meeting, the government informed Melka that work on the dredging and breakwater, rather than commencing in February 1995, could not begin until October 15, 1995, and requested that it agree to perform this work under the original contract price. By letter dated February 14, 1995, Melka agreed and proposed a completion date of February 29, 1996.[1] All work was completed by February 1996.

---

1. Three contract modifications were also entered into. Modification P00001, proposed by the government on March 30, 1995, was a bi-lateral modification that extended the time for performance through February 29, 1996 and compensated Melka for remobilization/demobilization costs associated with the postponement of the work until October 15, 1995. Modification P00002 was a bi-lateral modification that compensated Melka for costs arising from the changed condition of the quaywall and for the delay caused by the discovery of the pipe in November 1994. Modification P00003 was a unilateral modification compensating Melka for overhead and field costs arising from the costs associated with performing the work out of sequence and for its dredging and breakwater equipment for twelve days.

2. Melka also alleges that it is entitled to direct costs for the idle equipment and labor expenses, but we find Melka's arguments on these issues without merit, and not warranting specific discussion.

3. Determining the amount of recoverable damages under the "Eichleay formula" requires three steps: (1) find the allocable contract overhead by multiplying the total overhead cost incurred during the contract period by the ratio of billings from the delayed contract to total billings of the contractor during the contract period; (2) find the daily contract overhead rate by dividing the allocable contract overhead by the number of days of contract performance; and (3) determine the amount recoverable by multiplying the number of days of delay by the daily contract overhead rate. See Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1577 n.3 (Fed. Cir. 1994).

On appeal, as below, Melka asserts that it is entitled to recovery of its unabsorbed overhead from November 16, 1994 through March 30, 1995. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

I.

We review legal conclusions of the Court of Federal Claims de novo, while its factual findings at trial are reviewed for clear error. See Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998).

Melka alleges that it is entitled to reimbursement of its unabsorbed home office overhead costs caused by the government's delay as calculated by the formula articulated in Eichleay Corp., ASABCA No. 5183, 60-2 B.C.A. (CCH) 2688, 1960 WL 538 (1960). The Eichleay formula is the only means approved in our case law for calculating recovery for unabsorbed home office overhead. See E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1372 (Fed. Cir. 1999). Home office overhead typically includes accounting and payroll services, salaries for upper-level managers, general insurance, utilities, taxes, and depreciation. See Interstate Gen. Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1058 (Fed. Cir. 1993).

Melka must satisfy two requirements in order to show that it is entitled to Eichleay damages: (1) the government required the contractor to stand by during government-caused delay of indefinite duration; and (2) while and because of standing by, the contractor was unable to take on other work. Interstate, 12 F.3d at 1056. If the contractor can make out a prima facie case of (1) above, i.e., that the government-imposed delay was uncertain and that the government required the contractor to remain on standby, ready to resume full work immediately, the burden shifts to the government to show either (1) that it was not impractical for the contractor to obtain "replacement work" during the delay, or (2) that the contractor's inability to obtain such work, or to perform it, was not caused by the government's suspension. See West v. All-State Boiler, Inc., 146 F.3d 1368,

1376 (Fed. Cir. 1998).

A.

For the time periods from November 16, 1994 to January 4, 1995 and February 2, 1995 to March 30, 1995, the Court of Federal Claims correctly applied the law and did not clearly err in its factual findings when it concluded that Melka was not entitled to Eichleay damages because, it found, Melka was not on indefinite duration standby during those time periods. By failing to meet the "standby" requirement, Melka's claims for Eichleay damages during these periods must fail, even in the absence of government rebuttal evidence because Melka failed to establish a prima facie case of entitlement to Eichleay damages.

With respect to the earliest time frame, from November 16 (the beginning of Melka's alleged damages period) to November 29, 1994 (the date the government issued the formal Suspension of Work order), the Court of Federal Claims found that no government-imposed delay in fact occurred; therefore Melka could not have been on "standby" during this period. Although the government had failed to obtain a permit for the dredging and breakwater work, the parties had agreed that Melka would re-sequence its work so that non-permit related work could be done during this period, and Melka did so. The Court of Federal Claims did not clearly err in finding that Melka was not on standby when it was working on the contract and the government had not suspended all contract work.

With respect to the second time period, from November 29, 1994 to January 4, 1995 (the

approximate end of Melka's performance of all those contract tasks not dependent upon issuance of the permit), the Court of Federal Claims found that Melka was still not on standby. Although the government issued a suspension of work order at the beginning of this period, that order directed Melka to perform non permit-related work and indicated that the dredging permit would not be obtained until January or February, 1995. After the suspension of work order, Melka continued to work on the contract (with re-sequenced work) and did so on a virtually uninterrupted basis through January 3, 1995. Melka argues that because the dredging and breakwater work accounted for a significant amount of the work in the government contract, that once such work was suspended indefinitely Melka was on standby. Melka's argument would be more convincing if the entire government contract related to dredging and breakwater work, so that the suspension of work order effectively stopped any work on the contract. However, this was not the case. Other significant repair work required under the contract was performed through January 3, and the suspension of work order directed Melka to perform such work. Melka cannot establish that it was on standby by dividing the contract into one portion that was able to be performed (the repairs) and another that was on standby (the dredging and breakwater work), because the contract required that both types of work be performed. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Given these facts,

the Court of Federal Claims did not clearly err in finding that Melka was not on standby during this period.

During the latest time period, from February 2, 1995 (when the government informed Melka that permit-related work could not begin until October 15, 1995) to March 30, 1995 (the last date that Melka seeks recovery), the Court of Federal Claims found as a fact that Melka could not have been on standby because it knew then with certainty that it could not be called on to perform the work before October 15. This finding is not clearly erroneous because "standby" requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time. Here, Melka knew that it would not be called on to work on the contract until October 15. Nor was the government requiring Melka to keep at the Potomac River site its dredging and breakwater equipment. Rather, they were free to be moved and used elsewhere. Thus, Eichleay damages could not be awarded for this time period either.

B.

The penultimate time period, from January 4, 1995 (when Melka completed those contract tasks not dependent upon receipt of the permit) to February 2, 1995 (the date when the government and Melka agreed that the permit-related work would not commence until October 15, 1995), however, presents a different issue because the government concedes that Melka was on standby of indefinite duration during this period. The issue then becomes whether the government

satisfied its burden of showing that it was not impractical for Melka to obtain replacement work or that Melka's inability to obtain replacement work was due to circumstances not related to the government-caused delay. See All-State, 146 F.3d at 1376. The burden on the government, however, is one of production only--Melka still bears the ultimate burden of persuasion that it was impractical for it to obtain sufficient replacement work. See Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997) ("Despite the shift in the burden of production, the contractor must nevertheless 'establish . . . (3) that it was unable to take on other work.' Altmayer v. Johnson, 79 F.3d 1129, 1133 (Fed. Cir. 1996).").

In an effort to satisfy its burden, the government argues that Melka's work on the Steuart Petroleum and Leesylvania Park projects constitutes "replacement work." Those projects, according to the government, could not have been performed if Melka had been performing the dredging and breakwater parts of the government contract because, as Melka admits, it could only take on one such large dredging project at a time. The government also argues that Melka would have taken on more work had its bids been successful and the economy been stronger, both reasons unrelated to the government's delay and suspension of work. Melka argues that the projects it took on were not "replacement work" because they were relatively small in comparison to the work on the government contract and were merely moved up in its schedule in order to mitigate its losses as a matter of good faith.

The Court of Federal Claims, which did not have the benefit of the All-State case when it made its decision, noted that Melka performed several other projects while on standby and bid, unsuccessfully, on several others. The Court of Federal Claims stated that the "key to Eichleay damages is the ability to do other work," and concluded that "[b]y obtaining and bidding on other work, it is reasonable to infer that it had the capacity to perform work it obtained." Melka, slip op. at 8. On this basis, the Court of Federal Claims held that Melka was not entitled to any Eichleay damages for this time period.

We hold the Court of Federal Claims applied the wrong legal test by improperly focusing on Melka's ability to take on any other work during the delay period as a basis for holding that Melka was not entitled to any Eichleay damages. The test was incorrect because it failed to include a quantitative analysis. Although the incorrect test was applied by the Court of Federal Claims, its confusion was understandable given that All-State was not decided by this court until after the Court of Federal Claims rendered the decision here reviewed. See Interstate, 12 F.3d at 1055 (holding that the incorrect legal test for "standby" was applied, in part because of the unavailability of later, clarifying decisions of this court).

Also, at the time the Court of Federal Claims rendered its decision, this court's most recent application of the Eichleay formula was in Satellite Electric, portions of which could be read to indicate that if a contractor is able to perform any additional work during the delay that such

circumstances will entirely defeat its claim for Eichleay damages. In Satellite Electric, we said:

> Finally, we reject Satellite's argument that the government had not rebutted Satellite's prima facie case because it had not shown that the additional work Satellite sought was intended to replace the suspended work. The work Satellite sought during the time of suspension, if Satellite had obtained it, necessarily would have replaced the suspended work.

105 F.3d at 1423 (emphasis added). While acknowledging that this reading of Satellite Electric was plausible "at first glance," this court in All-State concluded that "in context [the statement in Satellite Electric] appears to respond to the contractor's attempt to incorporate an 'intent' element into the government's rebuttal burden of proof," and therefore did not contradict the conclusion reached by the All-State court that "additional work is not automatically considered replacement work which would preclude recovery under the Eichleay formula." All-State, 146 F.3d at 1377 n.2; see also Fred D. Wilshusen, Hard Hat Case Notes, 18 Construction Lawyer 41, 41 (A.B.A. Oct. 1998) (noting that the "intention of the decision" in Satellite Electric was not to require "a viable contractor to cease its normal operation and quit bidding work to recover under the Eichleay formula" and that All-State properly rejected such an overly literal interpretation of language in Satellite Electric). One commentator has noted:

> Satellite had argued that the

> Government was required to demonstrate that the additional work Satellite sought was not part of Satellite's planned or normal stream of work but instead was intended to replace the government-delayed work. . . . Two commentators have remarked that if this statement is interpreted literally, Satellite Electric can be read to mean that if a contractor bids on, or is capable of obtaining, additional, but not substitute, work during the delay period, the contractor will not be entitled to Eichleay damages. Both from a legal and an accounting perspective, it seems unlikely that the court intended such a construction.

Scott M. McCaleb, in 1997 Year in Review: An Analysis of the Federal Circuit's Government Contracts Decisions, Pub. Cont. L.J. at 495, 530-31 (A.B.A. Spring 1998) (footnotes omitted). Thus, the appropriate inquiry, per All-State, is whether the government established through rebuttal evidence or argument that Melka was able to take on "replacement work," not just any additional work. The Court of Federal Claims, however, did not address this point, but instead appeared to view any additional work performed or bid on by Melka as sufficient to bar its claim for Eichleay damages, totally. We are unable to discern from the record before us whether the work performed or bid on by Melka during this time frame was "replacement work," and even if so, produced sufficient support of overhead costs

to absorb all the overhead costs that the government contract would have, if work had not been suspended. Therefore, the case is remanded to the Court of Federal Claims for a determination of this issue.

C.

On remand, the Court of Federal Claims should bear in mind the heavy burden that falls on the government once a contractor has established its prima facie case of entitlement to Eichleay damages. As this court has stated,

> We note that in very few cases where the contractor can demonstrate it was on standby during the suspension will the government be able to demonstrate that it was not impractical for the contractor to take on replacement work. This does not persuade us, however, that either the test or the burden should be altered. First, the government has the ability to control whether a contractor is on standby status during a suspension of work. By fixing, at the outset of the suspension period, a future date on which the contractor will be expected to return to work, or by allowing the contractor a "remobilization" period at the end of the suspension period, the government avoids keeping the contractor on standby during the suspension and thus avoids liability

> for unabsorbed overhead expenses in the future.

All-State, 146 F.3d at 1380 (citation omitted); see also Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995) ("[W]e have also recognized the impracticality of a contractor obtaining replacement work or reducing home office overhead when it must 'standby' during an 'uncertain' period of government-imposed delay."); Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1577-78 (Fed. Cir. 1994) ("When the period of delay is uncertain and the contractor is required by the government to remain ready to resume performance on short notice (referred to as 'standby'), the contractor is effectively prohibited from making reductions in home office staff or facilities or by taking on additional work."); Interstate, 12 F.3d at 1057-58 ("When the period of delay or suspension is uncertain . . . and the contractor is required by the government to remain ready to resume performance on short notice ["standby"], the contractor is effectively prohibited from mitigating such overhead costs."); C.B.C. Enters., Inc. v. United States, 978 F.2d 669, 675 (Fed. Cir. 1992) ("As a result [of standby status], it is impractical for the contractor to take on other work during these delays."). Nevertheless, the government may be able to show that Melka was not injured by the delay. See All-State, 146 F.3d at 1380-81 ("[D]ifficult economic conditions that exist independent of the government's actions with respect to a delay in performance may prevent a contractor from obtaining replacement work, although this circumstance is in no way attributable to the

government's delay."); Satellite Elec., 105 F.3d at 1422 (contractor's inability to obtain other work was due in part to limitations in its security bond and a difficult competitive situation which were not due to the government delay). For example, the government argues that part of Melka's inability to obtain work was due to cold winter weather, rather than the government-caused delay and requirement to stand by. Such evidence bears directly on the issue of what caused Melka's inability to obtain adequate replacement work, if in fact it was unable to obtain such work. Or, if bad weather prevented performance of work that was obtained, that circumstance hardly results from the government-caused delay.

It is also important to keep in mind what does not constitute replacement work. For example, the government cannot rebut Melka's prima facie case of entitlement to Eichleay damages "simply by showing that the contractor continued its normal operations, including continuing to bid on and perform 'additional' contracts." All-State, 146 F.3d at 1376; see also Altmayer v. Johnson, 79 F.3d 1129, 1135 (Fed. Cir. 1996) ("That [contractor] may have bid on other contracts 'at the very end' of the subject contract, does not establish that it was able to reduce its overhead or take on other work during the delay."). As this court stated in All-State,

> it would be inconsistent with the purpose behind Eichleay recovery to require a contractor to cease all normal, on-going operations during a government-caused suspension on

> one contract in order to guarantee its recovery of unabsorbed overhead costs. A healthy contractor may well be simultaneously engaged in multiple contracts, at different phases of performance. A government-imposed suspension during performance of one contract will not necessarily affect a contractor's ability to obtain and perform others.

All-State, 146 F.3d at 1376. Bidding on other projects can also support, rather than undercut, a contractor's argument that it was impractical for it to obtain replacement work, particularly if the projects that are bid upon could not be commenced and/or completed within the government-caused delay. In this case, for example, Melka argues that it could not obtain replacement work by bidding on other projects because such work involves substantial lead-up times that would render it impossible to begin the project, much less complete it, in a reasonable period of time, much less before the suspension is lifted. With respect to the contract at issue here, for example, three and a half months elapsed from the time the project was advertised until work actually commenced. Such commercial realities in the relevant market may be highly material when determining whether it was impractical to obtain any replacement work, or sufficient replacement work.

Finally, the relative sizes of the projects at issue in terms of dollar amount, timing, and duration are relevant when determining whether

a particular project is in fact "replacement work," as opposed to merely "additional work" in the ordinary course of business for a contractor that routinely performs multiple contracts, including simultaneously. The key is the potential for the new work to contribute a comparable amount to the contractor's overhead as the government contract would have absent the suspension, assuming that the time durations are also comparable. As we have noted in the past, however, "replacement work" need not be identical in size, duration, or type as compared to the delayed work. See id. at 1377. Indeed, in All-State we said:

> [A] replacement contract might be a contract different in size or duration from a contractor's ordinary type of work (for example, a $100,000 contract by a contractor who normally obtains multi-million dollar contracts), or a contract for a different type of work (for example, a repair contract rather than new construction). The critical factor, then, is not whether the contractor was able to obtain or to continue work on other or additional projects but rather its ability to obtain a replacement contract to absorb the indirect costs that would otherwise be unabsorbed solely as a result of a government suspension on one contract.

Id. Therefore, the government can effectively rebut a contractor's prima facie case and show

that a claimant is not entitled to any Eichleay damages by showing that it was not impractical for the contractor to take on true replacement work and that work would contribute the same amount of money for the same time period toward overhead costs as the government contract would have, had the delay not occurred. On the other hand, if the same amount of money is not contributed to the overhead costs in the same period by the replacement work, then the contractor should be able to obtain at least some Eichleay damages.

The relevance of the dollar amount, timing, and duration of the replacement work vis-a-vis the government contract may be best illustrated with examples. Although not realistic, these examples illustrate the principles clearly. Imagine, first, that a contractor has established its prima facie case and that the government-caused delay in question although indefinite at the start turned out to be thirty days, with an overhead rate on the contract of $1000 per day. Also assume that it was not impractical for the contractor to obtain at least some "replacement work." If the government shows that it was not impractical for the contractor to obtain three ten-day replacement contracts and perform them consecutively during the delay, and each contract contributed $1000 or more each day to overhead costs, then all Eichleay damages would be precluded because all of the overhead costs would be absorbed by the replacement work. Without unabsorbed, indeed unabsorbable, overhead, there is no basis for Eichleay damages. Next assume that the government shows that it was

not impractical for the contractor to obtain one replacement contract that lasted ten days and for each day it contributed $1000 to overhead. Then, the contractor is still entitled to Eichleay damages for the remaining twenty days of delay. In another example, assume that the government shows that it was not impractical for the contractor to obtain one thirty-day replacement contract that contributed $500 per day to overhead costs. Then Eichleay damages would not be precluded because roughly half of the overhead costs would remain unabsorbed.

Of course, the government need not show that the contractor actually obtained replacement work, but can merely show that it was not impractical to do so. But even so, the government cannot preclude the recovery of all Eichleay damages by showing that some additional work could have been obtained, or by showing that some replacement work was obtained although it failed to fully offset all of the overhead shortfall created by the government's delay. Such a standard indeed places a heavy burden on the government, but the burden is appropriate when "the government has the ability to control whether a contractor is on standby status during a suspension of work." All-State, 146 F.3d at 1380. The government can avoid the difficulty of meeting the burden simply by not putting the contractor on standby. If, on the other hand, the government so values quick start-up and early completion once the suspension of work is lifted, then it will order indefinite standby, knowing of the possible liability. That is as it should be. Certainly, freedom of action should be left to the

government and the contractor. The court is the least equipped to decide such things.

The discussion of examples above is meant to guide the trial court's analysis on remand, which is necessary because the record before us does not clearly indicate whether the work performed and bid on by Melka qualifies as "replacement work" under present case law of this court. Because the trial court applied an incorrect legal test and Melka has shown that it may have been unable to obtain sufficient replacement work during this time period, we vacate the decision of the Court of Federal Claims to the extent that it denied Eichelay damages during the time period of January 4 to February 2. And we remand for a re-determination of this issue, possibly after receiving additional evidence, briefing, and/or argument from the parties, as the trial court sees fit.

III.

For the time periods between November 16, 1994 and January 4, 1995, and between February 2, 1995 and March 31, 1995, the Court of Federal Claims determined that Melka was unable to show that it was on standby and therefore held it was ineligible for Eichleay damages. We affirm those portions of its decision. With respect to the time period between January 4, 1995 and February 2, 1995, however, the Court of Federal Claims applied an incorrect legal standard to Melka's claims. We vacate that portion of its decision and remand for a re-determination under the correct test of whether Melka is entitled to Eichleay damages for that

period, either fully or in part. Accordingly, the decision of the Court of Federal Claims is

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

COSTS

No costs.

In the United States Court of Federal Claims

MELKA MARINE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 96-536C

Filed: July 26, 2002

ORDER

Plaintiff seeks attorney fees and expenses pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d) (2001). We do not address the requirements of the Act in detail because defendant's position in this litigation was substantially justified. The events that produced this lawsuit occurred in 1994 and 1995. Four discrete time periods during construction included government-caused delays. Plaintiff sued for resulting Eichleay damages, and we dismissed its complaint in 1998.

The Federal Circuit remanded a one-month period of delay for this court to reconsider plaintiff s claim for Eichleay damages in light of a ruling that it had issued in the meantime. Melka Marine, Inc. v. United States, 187 F.3d 1370.1380-81 (Fed. Cir. 1999), cert. denied, 120 S.Ct. 1555 (2000). See generally West v. All State Boiler, Inc., 146 F.3d 1368, 1376 (Fed. Cir.

1998). The parties settled the remanded portion of the case for about $16,000. Plaintiff applied for attorney fees of $566,000 and later adjusted them to $633,000 to account for its appeals of two trial court orders that the Federal Circuit affirmed. Melka Marine, Inc. v. United States, 29 Fed.Appx. 594, 595, Nos. 56, 01-5056, 5078, 2002 WL 188951 (Fed. Cir. Feb. 6, 2002), reh'g denied, (Apr. 3, 2002).

Cases addressing the meaning of term "substantial justification" include Pierce v. Underwood, 108 S.Ct. 2541, 2550 (1988) (citations omitted) (explaining that substantial justification is "'justified in substance or in the main'-- that is, justified to a degree that could satisfy a reasonable person."); and Freedom, N.Y., Inc. v. United States, 49 Fed.Cl. 713, 717 (2001) ("A position 'can be justified even though it is incorrect, and it can be substantially justified if a reasonable person could think it correct.'") (quoting Doe v. United States, 16 Cl.Ct. 412, 419 (I 989)). The timing of a government formulation of its position is the issue in Bowey v. West, 218 F.3d 1373, 1377 (Fed. Cir. 2000) ("[S]ubstantial justification is measured, not against the case existing at the time the EAJA motion is decided, but rather, against the case law that was prevailing at the time the government adopted its position.").

Defendant argued that Eichleay damages were not available to a contractor if he could have bid other jobs irrespective of whether he did - or if he did, whether he was successful. We questioned this position, but case law binding on this court seemed to support defendant's

argument. See Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997). See also Melka Marine, 187 F.3d at 1377 ("[A]t the time the Court of Federal Claims rendered its decision, this court's most recent application of the Eichleay formula . . . could be read to indicate that if a contractor is able to perform any additional work during the delay that such circumstances will entirely defeat its claim for Eichleay damages.").

The Federal Circuit made an effort to clarify the law on Eichleay damages during this period. The Circuit explained that, "although we have recently taken some steps to explain the requirements of the second prong, further clarification is necessary. At a minimum, we note that the language we have used with respect to the second prong has been vague regarding the time periods involved in determining Eichleay recovery." All State, 146 F.3d at 1374.

Government counsel had no reason to abandon defendant's legal position then, even if that had been a reasonable option. The law was uncertain at best, and seemed to favor defendant. The Federal Circuit explained that the "confusion was understandable given that All State was not decided by this court until after the Court of Federal Claims rendered the [Melka Marine decision]." Melka Marine, 187 F.3d at 1377 (citing Interstate Gen. Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1055 (Fed. Cir. 1993)).

The Federal Circuit remanded this case so that we could take testimony or consider briefs on the application of All State and other Eichleay cases to a one-month period of government delay. Melka Marine, 187 F.3d at 1380. It did not direct

us to rule for plaintiff. The parties settled the remanded claim so we do not know whether plaintiff would have prevailed using the new test.

Defendant's position in this litigation was justified. For that reason, plaintiffs claim for EAJA damages must be DENIED.

_____/s_____
Robert H. Hodges, Jr.
Judge

In the United States Court of Federal Claims

MELKA MARINE, INC.,

Plaintiff, No. 96-536C

v. Filed: February 1, 2000

UNITED STATES,

Defendant.

ORDER

We rejected plaintiff s application for attorney's fees m a December 4 Order because it was not under oath and was premature. The judgment was not final until after the appeal time had run. Plaintiff appealed this Order to the Federal Circuit on January 26. Plaintiff resubmitted its application to this court on the same day. We have no choice but to return plaintiffs materials unfiled as premature because this case is currently on appeal.

The Clerk will return plaintiff s materials as unfiled. We will consider plaintiff s motion once the appeal is final.

_____/s_____
Robert H. Hodges, Jr.
Judge

In the United States Court of Federal Claims

MELKA MARINE, INC.,

Plaintiff, No. 96-536C

v. Filed: December 4, 2000

UNITED STATES,

Defendant.

ORDER

The Clerk has rejected plaintiffs application for attorneys fees because its application is not under oath and the motion is premature. The judgment is not final until after appeal time has run. Plaintiff argues that the Government's position cannot be substantially justified though the court agreed with defendant, albeit reluctantly. The court felt constrained to rule for the Government based on then-current binding precedent. The circuit determined that some of this precedent was mere dicta, and remanded for application of a different test.

We will, of course, consider the parties' views when this issues arises; however, we ask that counsel focus on the issue outlined above. The Clerk will return plaintiffs materials unfiled as premature.

_____/s_____
Robert H. Hodges, Jr.
Judge

In the United States Court of Federal Claims

No. 96-536 C

MELKA MARINE, INC.,

v. JUDGMENT

UNITED STATES OF AMERICA

Pursuant to the parties' October 27, 2000 Joint Stipulation for Entry of Judgment and the court's directive of October 31, 2000, authorizing the clerk to enter judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff shall recover of and from the United States the sum of $16,090.94, together with interest on this amount, pursuant to the Contract Disputes Act, from June 21, 1996, until the date Melka Marine, Inc. receives payment.

Margaret M. Earnest
Clerk of Court

November 1, 2000 By: /s/
Deputy Clerk

United States Court of Federal Claims

96-536C

MELKA MARINE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

June 10, 1998

[41 Fed.Cl. 122]

OPINION AND ORDER

HODGES, Judge.

Melka Marine moved for summary judgment on the issue of liability, claiming unabsorbed overhead and direct costs for idle equipment and loss of productive labor incurred as a result of the Government's issuance of a "Suspension of Work" order. Plaintiff asserts that defendant's failure to obtain a dredging permit resulted in increased costs for which it was not compensated. Defendant cross-moved for summary judgment contending that plaintiff was fully compensated for any direct costs through contract modifications. Furthermore, plaintiff cannot establish the elements necessary to recover unabsorbed overhead under the Eichleay formula, according to defendant.

We denied the cross-motions for summary judgment because the circumstances surrounding the contract work performed by Melka Marine during the delay were unclear. Plaintiff proceeded to perform portions of the contract while other portions of the contract were delayed. Summary judgment is not proper where a material fact is in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

BACKGROUND

Plaintiff entered into a contract with the United States Navy on October 17, 1994. The contract included dredging work on the Potomac, construction of a breakwater, repair of an existing boat ramp and various other construction work at the Indian Head Marina in Maryland. Performance on the contract was to begin within 15 days of contract award with all work to be completed in 90 days. According to the contract, no work could take place between March 1 and June 15 due to the rock fish spawning season. The breakwater and dredging portions of the contract were to be performed first. The Government was required to obtain a permit from the Corps of Engineers prior to the dredging and breakwater work.

Plaintiff mobilized its equipment November 1 through November 15, 1994. During mobilization, the Government informed plaintiff that it had not received a permit from the Corps. The Government issued a Suspension of Work order to plaintiff on November 29, halting

performance of the contract for an indefinite period. The Contracting Officer sent a letter to plaintiff on December 1 stating that the dredging permit was not expected until mid-January or mid-February. The Government instructed plaintiff to demobilize any equipment set aside for use on dredging and breakwater work.

Plaintiff received a letter from the Government in February 1995 stating that performance on the breakwater and dredging portions of the contract could not begin prior to October 15, 1995 because of permit delays and the rock fish spawning season. Plaintiff accepted the October 15 work resumption date and signed Contract Modification P00001 in March 1995. This extended the contract deadline to February 29, 1996 and increased the contract price by $42,688. Three other modifications were executed, only two of which are relevant here. Contract Modification P00002 in the amount of $7,163 was issued to compensate plaintiff for a changed condition in the quaywall, as well as for delay in work due to an uncovered pipe at the boat ramp excavation. Contract Modification P00003 for $19,837 was issued to reimburse plaintiff for overhead and field costs due to the Government stop work order of December 1, 1994. All work was completed in February 1996. Plaintiff seeks compensation for unabsorbed overhead and directs costs from November 16, 1994 through March 30, 1995.

DISCUSSION

The Eichleay formula is the appropriate test

to determine whether unabsorbed overhead may be recovered in government contracts. Satellite Electric Co. v. Dalton, 105 F.3d 1418, 1419 (Fed.Cir.1997). It is used to determine unabsorbed overhead "when the government delays work on the contract indefinitely but requires the contractor to remain available to resume work immediately on the government's instruction." Id. In general, "unabsorbed overhead consists of the time sensitive indirect costs incurred despite construction inactivity on a project, such as home office overhead including accounting and payroll services, general insurance, salaries of upper-level management, heat, electricity, taxes [and] depreciation." Interstate General Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1058 (Fed.Cir.1993) (citing Capital Electric Co. v. United States, 729 F.2d 743, 746 (Fed.Cir.1984)). It is understood that overhead costs are those incurred "'for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract." Altmayer v. Johnson, 79 F.3d 1129, 1132 (Fed.Cir.1996).

To recover unabsorbed overhead under the Eichleay formula, a contractor must establish (1) a government-imposed delay, (2) that the contractor was required to be on "standby" during the delay, and (3) while "standing by" the contractor was unable to take on additional work. Satellite, 105 F.3d at 1421 (emphasis added); Mech-Con Corp v. West, 61 F.3d 893, 886 (Fed.Cir.1995); Altmayer, 79 F.3d at 1133. Once it is shown that the contractor was required to standby and that the government-imposed delay

was uncertain, the contractor has established a prima facie case of entitlement to unabsorbed overhead. The burden then shifts to the Government to show (not prove) that "the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay." Mech-Con, 61 F.3d at 886. The contractor must establish that it was unable to take on other work during the period of delay. Satellite, 105 F.3d at 1421.

The Federal Circuit reaffirmed the use of the Eichleay formula in Satellite, 105 F.3d at 1418. In Satellite, the Navy contracted with the plaintiff to install a power supply system. Twice during the contract period, the Government suspended performance because of its inability to supply two items called for in the contract. The first period of suspension lasted 82 days; the second 146 days. During this suspension, plaintiff was required to "standby," but remain ready to resume work on the contract upon the Government's instruction.

Satellite bid on 49 contracts while standing by. It obtained only two. Thereafter, the plaintiff filed a claim with the Armed Services Board of Contract Appeals requesting Eichleay damages. The Board ruled that while Satellite had made out a prima facie case, the Government had successfully rebutted it by showing that the plaintiff could have reduced its overhead or taken on other work during the delay.

The court of appeals affirmed the Board's decision on appeal stating that plaintiff was not entitled to Eichleay damages because it could

have taken on other work during the delay. The court noted that Satellite had bid on 49 jobs and was "aggressively" pursuing other contracts. This shows that it had the capacity to perform other work. "If the government shows that the contractor was able to handle other work--whether or not it actually did so, which may have depended upon circumstances other than the delay--it refutes the underlying fact on which Eichleay damages are based." Satellite, 105 F.3d at 1423.

Plaintiff seeks unabsorbed overhead from November 16, 1994 to March 30, 1995. We will examine the claim in relation to four time periods.

A. November 16, 1994 to November 29, 1994

For a contractor to claim unabsorbed overhead under the Eichleay formula it must prove government-imposed delay. Id. at 1420. The Government issued a Suspension of Work order on November 29, 1995. This order suspended work on all portions of the contract for an indefinite period. No government-imposed delay occurred prior to November 29; the Suspension of Work order had not been issued. Therefore, no recovery is permitted during this time.

B. November 29, 1994 to January 4, 1995

Government-imposed delay began on November 29, 1994 when defendant suspended work on the contract after plaintiff requested that the Navy review designs of the boat ramp and advise whether a previous ramp was in existence. The Government issued a revised stop work order on December 1 instructing plaintiff to begin work on repairs to the quaywall, the finger pier, and the

boat ramp once all questions concerning its design were determined. All work relating to the dredging and breakwater work was to be demobilized.

Plaintiff was compensated for delay from November 29 to December 1 through Contract Modification P00003. The modification stated in part:

> You are hereby compensated for overhead and field costs due to the Government issued stop work order . . . dated 29 November 1994, further revised by stop work order . . . dated 1 December 1994. Boat ramp work was delayed until 15 December 1994.

The contract price was increased by $19,837 by this modification. Modification P00003 covered the stop work order costs through December 15. Plaintiff claims that this was a unilateral modification and that costs claimed for unabsorbed overhead are not covered by modification P00003. Plaintiff did not produce evidence at trial to establish that these costs were not covered by the modification, however.

Plaintiff was not on standby from December 1 through January 4 so it does not meet the requirements for unabsorbed overhead under the Eichleay formula. The December 1 letter advised plaintiff that the dredging permit would not be available until January or February. Specifically, it stated, "[a]ll equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized."

Plaintiff resequenced work under the contract and performed other work that did not

require a dredging permit. The contract specifications "reserve[d] the right to change the order of work at any time." If plaintiff was working on the contract, it was not delayed or on standby. Plaintiff was uncertain when it could begin the breakwater and dredging portions of the contract, but that did not affect the resequenced work. Mr. Melka admitted during trial that Melka Marine was instructed to "demobilize [its] equipment ... [and] mitigate [its] damages."

The "standby" prong of the Eichleay formula does not focus on the idleness of the contractor's work force, but on suspension of work on the contract. Interstate, 12 F.3d at 1057. Plaintiff claims that because its employees were not working on the contract every single day, it should be compensated for the days of idleness. If the test for standby were whether the work force assigned to the contract remained idle, the contractor would be less likely to mitigate its damages by laying employees off or reassigning them to other jobs during the standby period. Id. at 1057 n. 4. Plaintiff was working on the contract, so it was not on standby. Delay days prior to December 1 were covered through Contract Modification P00003. No recovery is available for unabsorbed overhead from November 29, 1994 to January 4, 1995.

C. January 4, 1995 to February 2, 1995

Plaintiff did not perform work on the Navy contract from January 4 to February 2, 1995. The Suspension of Work order delaying the breakwater and dredging portions of the contract was still in effect. The Government concedes that plaintiff was on standby during this period.

Once it is determined that a contractor was required to "standby," the question becomes whether the contractor "was able to either reduce its overhead or take on other work during the delay." Mech-Con, 61 F.3d at 886. The Eichleay formula seeks to "compensate[ ] contractors who are unable to take on replacement work because the standby status prevents the contractor from doing so." Satellite, 105 F.3d at 1421. Damages for unabsorbed overhead are available only if the contractor's inability to take on other work is attributable to the Government. Id.

Plaintiff contends that it could not take on additional work beyond the work it actually performed. Its president testified that during the Suspension of Work order the Government had "their hooks into me . . . [and] you got to be ready to go when they call you." Plaintiff did take on other work during the standby period, however. It performed work for PEPCO, the Arlinton County Playground, Steuart Petroleum and Leesylvania Park. Plaintiff "bid . . . probably 15 jobs . . . [and] received contracts on about half of those jobs . . ." according to a consultant for Melka Marine. Mr. Melka confirmed that marine equipment could be used whenever he found work for it.1 Plaintiff could have obtained other work, and it did.

The key to Eichleay damages is the ability to do other work. Plaintiff incorrectly assumes that even it if could use its equipment on other jobs, if those other jobs did not reimburse it for every hour of the suspended contract then the Government is liable. This is not the Eichleay test. Whether plaintiff received the jobs it bid is

irrelevant. By obtaining and bidding on other work, it is reasonable to infer that it had the capacity to perform work it obtained.

D. February 2, 1995 to March 30, 1995

Plaintiff was given a date certain when the breakwater and dredging portions of the contract could be completed on February 2. The Government informed plaintiff by letter that the breakwater and dredging work would not be performed until October 15, 1995. The letter stated in part:

> a. There are no impact and delay costs associated with delaying the remaining portion of the work.
>
> b. Performance of the dredging and breakwater extension portion of the contract must be at your *original bid price* and cannot begin prior to 15 October 1995.
>
> c. If you agree to the above mentioned conditions, a modification will be negotiated for time and *demobilization/remobilization costs only.*

Plaintiff agreed to these terms. Plaintiff was no longer on standby at this point. It had certainty.

Furthermore, the original contract stated

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1. Q: "Isn't it true that [you] used that [marine] equipment whenever you could?"
A: "Absolutely. If I could use it to mitigate my damages, I did, and I never charged [the Government] for that time."

that the dredging and breakwater work could not commence between March 1 and June 15 due to the rock fish spawning season. Plaintiff no longer was on standby then, so it cannot recover under the Eichleay formula for this period.

E. Direct Costs

Plaintiff maintains that it is entitled to an equitable adjustment for direct costs for idle equipment and labor during the period of government-imposed delay. To be compensated for idle equipment, the contractor must show:

> that the equipment for which compensation is claimed was reasonably and necessarily set aside and awaiting use in performing the contract. Stated differently, we must be able to conclude that a contractor would prudently have held the equipment for which a claim is made in readiness to perform the Government contract rather than making some other disposition of it, in order to find that the Government should pay the charges for that equipment.

J.D. Shotwell Company, ASBCA No. 8961, 65-2 BCA ¶ 5243 at p. 24,687, 1965 WL 591 (November 30, 1965). Moreover, the contractor must be deprived of productive use of the equipment "by being compelled by circumstances for which the Government is responsible to keep the equipment idle. It is not enough that the equipment simply was idle because the contractor had no other use for it at the time." Lionsgate

Corporation, ENG BCA Nos. 5388, 5416, 5421, 5456, 91-2 BCA ¶ 24,008, 1991 WL 87879 (May 15, 1991).

We ruled in an earlier Opinion that plaintiff is not entitled to direct costs from March 1 through June 15, 1995. The contract prohibited work during this time due to the rock fish spawning season. Thus, the only relevant periods for purposes of direct cost analysis are November 16 through March 1, 1995.

Plaintiff was compensated for idle equipment costs through December 15, 1994. Modification P00003 reimbursed plaintiff $19,837 for overhead and field costs associated with the Government's stop work order. Plaintiff did not incur costs other than those reimbursed by Modification P00003.

Plaintiff's dredging equipment was demobilized from the Indian Head site and used on other construction projects during the delay period. For example, plaintiff mobilized its equipment to the Steuart Petroleum job in January 1995, and then to the Leesylvania Park job through March 1995. The equipment was used on other contracts. The Government did not require that plaintiff keep its equipment idle during the delay.[2] We cannot say that plaintiff was deprived of economic benefit when it could move the equipment to other job sites. Plaintiff did not use the equipment every day, but it could have used the equipment had it found work.[3] The equipment did not have to remain idle.

Plaintiff knew that the dredging permit had not been received in November 1994. The contract required that the contractor "coordinate

with the Contracting Officer" regarding the dredging permit.

Modification P00001 extended the dredging and breakwater portions of the contract to October 15, 1995. Plaintiff was informed at a February 2 meeting that work could not begin until October. So plaintiff was not required to keep its equipment idle beginning in February. Moreover, no work could be performed during the rock fish spawning season. Plaintiff was not required to keep its equipment idle. It was told to demobilize it.

Plaintiff claims direct costs for loss of productive labor. The Government is generally liable for increased costs of idled labor during a

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2. "All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized. Take any other steps necessary to minimized the incurrence of costs due to the suspension of permit related work." See Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment, at Exhibit 6.

3. Q: "On the day where you charged a half day for [the marine equipment], had you wanted to use it the rest of that day you would have, wouldn't you have?"
A: "If I could have used it, yes, I absolutely would have used it..."

government-imposed suspension of work. See Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25, 877, 1993 WL 70913 (March 3, 1993). During a work stoppage, a contractor must mitigate idle labor costs by transferring labor to other uses pending recommencement of the suspended work. Id. (citing Hardeman-Monier-Hutcherson (JV), ASBCA No. 11785, 67-1 BCA ¶ 6210 at 28,748.)

Plaintiff contends that the Government delayed work under the contract, so it is entitled to incurred labor costs. Plaintiff's laborers were performing work on the resequenced portions of the contract throughout December 1994. When plaintiff's employees were not working on the contract in January, they were performing other construction projects.

Plaintiff claims that it could not have released any employees because they were Melka Marine's "core crew." No evidence presented at trial showed that all idle labor claimed was necessary. Plaintiff could have layed off employees pending recommencement of the Navy project. Plaintiff kept personnel employed during days when no contract work was ongoing by requiring them to do "shop work." This work consisted of maintenance and repair of Melka Marine's equipment. While plaintiff claims this work is not significant, it derived a benefit from it. Plaintiff's claim for direct costs for idle equipment and labor cannot be sustained. The record at trial does not establish that these are costs properly chargeable to the Government.

CONCLUSION

We denied the parties' motions for summary judgment on the issue of Eichleay and direct damages because they are factual determinations according to the Satellite line of cases. In such circumstances, it was proper to hear testimony about plaintiff's willingness and ability to obtain contracts during the delay. Mr. Melka testified candidly that his effort was to "mitigate damages." This was an understandable and proper good faith effort that benefits the Government. He could have obtained other work during the suspension period, and he attempted to do so. In at least one instance, he was successful. There were small jobs, not of the magnitude offered by the Government. Nevertheless, the law seems clear that ability to take on other contracts is the dispositive factor.

We ruled from the bench that plaintiff had not shown an inability to obtain other contracts during the applicable period. We did not grant defendant's Rule 52 motion at that time because plaintiff asked that the record remain open for post-trial briefs and for other considerations. We have considered these maters, but now must enter judgment for the Government for the reasons stated by the court in this Opinion and on the record at trial. The Clerk will dismiss plaintiff's complaint. No costs.

United States Court of Federal Claims

96-536C

MELKA MARINE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

August 4, 1997

[38 Fed.Cl. 545]

ORDER AND OPINION
HODGES, Judge

The case is before the court on cross-motions for summary judgment. Plaintiff is seeking unabsorbed overhead and direct costs for delays caused by the Government's Suspension of Work order.

I. Background

Plaintiff was awarded a contract by the United States Department of the Navy on October 17, 1994. The contract included dredging work on the Potomac, construction of a breakwater, repair of a boat ramp and other construction work at the Indian Head Marina in Maryland. Under the terms of the contract, performance was to begin within 15 days of the contract award and

all work would be completed within 90 days. The contract specified that no work could take place during rock fish spawning season, March 1 through June 15. According to Melka Marine's government-approved contract schedule, the breakwater and dredging portions of the contract were to be performed first. All work was to be completed within 81 days.

The contract specified that the Government was responsible for obtaining a permit from the Corps of Engineers prior to commencement of the dredging and breakwater portions of the contract. Plaintiff mobilized its equipment on site November 1 through November 15. During mobilization, the Government informed Melka Marine that it had not received the permit. The Government issued a "Suspension of Work" order to Melka Marine on November 29, halting performance of the dredging and breakwater portions of the contract for an indefinite period. The Government had not obtained the permit by the end of March, despite reassurances.

Melka Marine signed Contract Modification P00001 in March 1995, extending the contract deadline to February 29, 1996.[1] The contract price was increased by $42,688. Two additional contract modifications were signed by the parties. All work on the contract was completed in February 1996.

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1. Originally, all work on the contract was scheduled to be completed by January 30, 1995. Under the modification, completion of the contract was delayed 419 days.

Melka Marine seeks compensation for unabsorbed overhead and direct costs from November 16, 1994 through March 30, 1995. We deny the cross-motions.

II. Decision

Plaintiff filed a motion for partial summary judgment on the issue of liability. Plaintiff argues that the Government is liable under the "Suspension of Work" clause incorporated into the contract for "any increase in the cost of performance of this contract (excluding profit) necessarily caused by . . . unreasonable suspension, delay . . ." FAR 52.212-12 (1994 ed.)

To recover under the "Suspension of Work" clause, a contractor must show that:

> (1) contract performance was delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss.

Commercial Contractors, Inc. v. United States, 29 Fed. Cl. 654, 661-662 (1993). Plaintiff argues that it meets these requirements, and that defendant is liable for direct costs. Plaintiff also argues that the Government is liable for unabsorbed overhead costs under the Eichleay formula. Defendant contends that plaintiff already has been compensated for increased direct costs and that the Government is not liable for overhead costs because plaintiff was able to take on other work during the delay.

Recovery of unabsorbed overhead costs is

determined by the Eichleay formula. Satellite Electric Co. v. Dalton, 105 F.3d 1418, 1421 (Fed.Cir. 1997). To recover Eichleay damages, a plaintiff must establish that the Government caused the delay, the contractor was on standby during the delay and the contractor was unable to take on other work. Altmayer v. Johnson, 79 F.3d 1129, 1133 (Fed. Cir. 1996). Plaintiff bears the burden of proving the compensable delay, to stand by. Satellite Electric, 105 F.3d at 1421. Then, the burden shifts to the defendant. To rebut plaintiff's case for Eichleay damages, the Government need only show (and not prove) that the contractor could have taken on other work during the delay period. Id.

The Government argues that Melka Marine not only could have taken on other work, but also that it performed other work. Melka Marine did perform other contracts during the delay. Eichleay damages are improper when the contractor has obtained additional jobs while on delay because unabsorbed overhead from the suspended contract may be applied to the new contracts. If the contracts were obtained prior to the suspension and were rescheduled to be performed during the delay, Eichleay damages still may be appropriate. Contracts accepted previously cannot absorb overhead from the suspended contract.

One contract performed by plaintiff during the delay was received prior to the suspension. The circumstances of other work performed during the delay are unclear. Whether this work was obtained prior to the suspension or after is an issue of fact. While several portions of the

contract were suspended because a permit had not been obtained by the Government, plaintiff proceeded with other portions of the contract. Summary judgment is proper when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Bradbary v. United States, 30 Fed. Dl. 339, 340 (1994).

Work on the contract was prohibited from March 1 through June 15 because of the rock fish spawning season. Plaintiff is not entitled to overhead costs during this time. The same limitation on recovery applies to direct costs during this period.

Plaintiff's claim for direct costs is for idle labor and equipment. Delay damages for these direct costs involve questions of fact that are disputed. Defendant argues that the multiple contract modifications signed by the parties compensated plaintiff for all increased direct costs. Plaintiff contends that it is seeking an adjustment for costs other than those described by the modifications. This is a factual issue that cannot be decided on summary judgment. Defendant's motion for summary judgment must be denied on the issue of direct costs.

III. Conclusion

Plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment are denied for the reasons stated. The parties will contact the court no later than August 15, 1997 to propose a trial schedule.

United States Court of Appeals for the Federal Circuit

02-5166

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THERETO, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 5, 2003.

FOR THE COURT
/s/
Jan Horbaly
Clerk

Dated: May 29, 2003

United States Court of Appeals for the Federal Circuit

01-5056, -5078

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

Before MAYER, Chief Judge, MICHEL, Circuit Judge, and LOURIE, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same
hereby is, DENIED.

The mandate of the court will issue on April 10, 2002.

FOR THE COURT

/s/
Jan Horbaly
Clerk

Dated: April 3, 2002

United States Court of Appeals for the Federal Circuit

98-5149

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THERETO, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 14, 1999.

FOR THE COURT
/s/
Jan Horbaly
Clerk

Dated: October 7, 1999